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No. 87-1190

Supreme Court, U.S.
FILED
MAY 6 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA, PETITIONER

v.

RAY C. BROCE AND BROCE CONSTRUCTION CO., INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

CHARLES FRIED
Solicitor General

CHARLES F. RULE
Assistant Attorney General

LOUIS R. COHEN
Deputy Solicitor General

KENNETH G. STARLING
Deputy Assistant Attorney General

ROY T. ENGLERT, JR.
Assistant to the Solicitor General

JOHN J. POWERS, III
JOHN P. FONTE
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

39 pp

QUESTION PRESENTED

Whether a defendant who pleads guilty to two indictments alleging two different criminal conspiracies, as part of a plea bargain in which the government agrees not to prosecute him on other charges, is entitled to a factual determination of his contention, raised for the first time in a later collateral attack on his sentences, that the two conspiracies alleged were actually a single conspiracy.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The order and judgment of the court of appeals affirming the district court's grant of relief to respondents (Pet. App. 1a-4a) is unreported. The memorandum and order of the district court granting respondents relief (Pet. App. 5a-13a) is unreported. The prior opinion of the en banc court of appeals reversing the district court's denial of relief (Pet. App. 14a-86a) is reported at 781 F.2d 792. The prior opinion of the court of appeals panel (Pet. App. 87a-111a), which was vacated on the grant of rehearing en banc, is reported at 753 F.2d 811. The original memorandum and order of the district court denying respondents relief (Pet. App. 112a-123a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-4a) was entered on August 18, 1987. A petition for rehearing and suggestion for rehearing en banc was denied on November 13, 1987 (Pet. App. 124a-125a). The petition for a writ of certiorari was filed on January 12, 1988, and was granted on February 29, 1988. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Double Jeopardy Clause of the Fifth Amendment provides: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

STATEMENT

Respondent Ray C. Broce is the president of respondent Broce Construction Co., Inc. Both respondents were named as defendants in two separate indictments filed in the United States District Court for the District of Kansas. Each indictment charged, among other things, conspiracy to rig bids on a specific Kansas highway construction project in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. Pursuant to plea bargains, both respondents entered guilty pleas to the Sherman Act counts of both indictments, and Mr. Broce also pleaded guilty to one count of mail fraud in violation of 18 U.S.C. 1341. The district court accepted the guilty pleas. Consistent with the plea bargains, the court imposed a total fine of $1.5 million ($750,000 on each Sherman Act count) on the corporation and sentenced Mr. Broce to concurrent two-year terms of imprisonment and a total fine of $101,000. Respondents subsequently filed a motion to vacate the sentences imposed on the charges in the second indictment. They based their request for relief on the ground that the sentences imposed on those charges constituted multiple punishment for the same offense in violation of the Double Jeopardy Clause. The district court initially denied the motion, but the court of appeals reversed and remanded for a factual determination. On remand, the district court granted the motion. The court of appeals affirmed.

1. In a two-count indictment filed on November 17, 1981 (Pet. App. 143a-151a), respondents were charged with one count of violating Section 1 of the Sherman Act and one count of mail fraud in violation of 18 U.S.C. 1341. The indictment alleged that the object of the Sherman Act conspiracy was to rig bids on Kansas Federal-Aid Highway Project No. 23-60-RS-1080(9) (the Meade County project), let by the State of Kansas on April 25, 1978. The indictment charged that the conspiracy began in or about April 1978. Pet. App. 147a.

Respondents were at all times represented by retained counsel. Plea negotiations began after the government sent a letter to respondents' counsel on January 11, 1982,[1] advising him that the government would seek an additional indictment against respondents for conspiracy to rig bids on a Ford County project let by the State of Kansas on July 17, 1979 (J.A. 75-76). Plea negotiations proceeded, and on January 22, 1982, the government sent respondents' counsel a letter enclosing draft plea agreements, which were eventually signed and were filed with the district court on February 8, 1982 (Pet. App. 126a-132a, 133a-135a).

In those agreements, both respondents agreed to plead guilty to the indictment charging them with conspiracy to rig bids on the Meade County project, and Mr. Broce agreed to plead guilty to the mail fraud charge. Respondents also agreed to plead guilty to a second indictment, which had not yet been filed, charging them with conspiracy to rig bids on a Barton County project let by the State of Kansas on July 17, 1979.[2] Respondents acknowledged in their plea agreements that the maximum fine for each Sherman Act count to which each of them was agreeing to plead guilty was $100,000 for Mr. Broce (Pet. App. 127a) and $1,000,000 for the corporation (*id.* at 134a). See 15 U.S.C. 1. Mr. Broce also acknowledged that consecutive sentences could be

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[1] The date stamp actually gave the year incorrectly as 1981.

[2] Respondents were never indicted for rigging bids on the Ford County project referred to in the government's letter of January 11, 1982.

imposed (Pet. App. 127a). In return for the guilty pleas, the government agreed, among other things, (1) not to prosecute respondents for other antitrust violations in Kansas and Oklahoma;[3] (2) to dismiss the mail fraud count against the corporation in the November 17 indictment; and (3) to recommend a total fine of $1.5 million against the corporation on the Sherman Act charges (Pet. App. 127a-128a, 134a-135a).

On February 4, 1982, as had been contemplated in the plea agreements, respondents were charged in a separate one-count indictment (Pet. App. 136a-142a) with Sherman Act conspiracy. The indictment alleged that the object of the conspiracy was to rig bids on the Barton County project, Kansas Public Highway Project No. KRL 29-2(26). The indictment charged that the conspiracy began in or about July 1979. *Id.* at 139a.

On February 8, 1982, respondents entered guilty pleas to the two Sherman Act conspiracy charges in accordance with the previously negotiated plea agreements. At the hearing conducted pursuant to Fed. R. Crim. P. 11, the district court ascertained that respondents understood that they "would be admitting all the facts alleged in these charges" (J.A. 35). The district court also explained that, "so far as the corporation is concerned, the maximum punishment is a fine up to one million dollars on each [Sherman Act] charge" and that, "as to you [Mr. Broce] individually, * * * the maximum punishment is a fine up to one hundred thousand dollars and a term of imprisonment up to three years on each [Sherman Act] charge" (J.A. 36). Mr. Broce indicated

[3] Respondents had in fact engaged in substantial violations of the Sherman Act in Oklahoma, some of which are described in detail (drawing on Mr. Broce's immunized testimony at two trials of Oklahoma co-conspirators following his guilty plea in this case) in *United States v. Washita Constr. Co.*, 789 F.2d 809 (10th Cir. 1986), and *United States v. Metropolitan Enterprises, Inc.*, 728 F.2d 444 (10th Cir. 1984).

without qualification that he understood (*ibid.*). The court questioned Mr. Broce, under oath, as to whether the government's written statement of facts in support of the pleas (Pet. App. 129a-132a) was correct. In response, Mr. Broce stated that he intended to let each bid-rigging agreement "stand on its own" and thus refused to discuss a future job in Grey County at the time the Meade County job was rigged (J.A. 40-41). He also stated, with one other qualification not relevant here, that the government's statement of facts was correct (J.A. 41-42). Defense counsel stated that he saw no reason "why the Court should not accept these pleas of guilty" (J.A. 43). The court did accept the pleas.

Before sentencing, the government prepared and provided to defense counsel an "Official Version of the Offense" for inclusion in the presentence report (J.A. 50-59). That document discussed a large conspiracy in Kansas in which respondents and others had participated before 1973 but stated that, "in about 1973, this conspiracy ended" (J.A. 50). It also stated that there were "two *separate* conspiracies giving rise to the indictments" (J.A. 51 (emphasis added)).[4]

Sentencing occurred on March 15, 1982. Defense counsel was given an opportunity to state "any dispute with what the government has included in the pre-sentence report about the official version of the offense" (J.A. 63-64). Defense counsel expressed some disagreements with the Official Version but did not dispute the explicit statements in the Official Version that the large, continuing conspiracy ended in 1973 and that there were two separate conspiracies giving rise to the two indictments (J.A. 64).[5] The court

[4] Through a proofreading oversight on our part, the word "Indictments" is incorrectly printed in the joint appendix as "Indictment." The word is plural in the original document.

[5] Among other things, the Official Version of the Offense described how the Meade County and Barton County projects were rigged. The Meade County project was one of several projects let by the State of

asked whether there was "any legal reason * * * why sentence should not be pronounced," and defense counsel responded: "None known to the defendant, Your Honor" (J.A. 65). The court then imposed on the corporation the fines that the government had agreed to recommend. The court also sentenced Mr. Broce to two years' imprisonment and to fines of $50,000 on each Sherman Act count and $1000 on the mail fraud count. J.A. 66-67.[6] On the government's motion, the court thereafter dismissed the mail fraud count against the corporation (J.A. 67).

Respondents did not appeal. Nor did they, at any time before sentencing, claim that the two indictments in fact alleged the same conspiracy.

Kansas on April 25, 1978. During a series of meetings and discussions the night before that letting, many projects that were to be let were allocated among several road construction companies. For example, both respondents and Carlile Asphalt Company, Inc., were interested in the Meade County project. Initially, they were unable to agree which company would be allocated that project (J.A. 52). During the negotiations, Carlile offered to let respondents win the Grey County project that was to be let in May, in exchange for the Meade County project. Respondents, however, rejected this proposal because Mr. Broce preferred to let each bid-rigging agreement "stand on its own" (J.A. 41). Ultimately, Carlile agreed that respondents could be the low bidder on the Meade County project and that Carlile would be the low bidder for a Seward County project that was also let on April 25 (J.A. 52-53). The bids on the Barton County project, let on July 17, 1979, were rigged the night before the letting (J.A. 54-55). Both respondents and the Venture Corporation initially were interested in being the low bidder for the project (J.A. 54). Ultimately, however, the project was allocated to respondents. In exchange, respondents agreed to pay $75,000 to the Venture Corporation (J.A. 55). All of these facts, admitted by respondents at the time of their sentencing, lent substantial support to the allegations of the indictments that separate conspiratorial agreements were formed in April 1978 and in July 1979.

[6] Mr. Broce has paid his $101,000 fine and served his prison term. The corporation has paid $750,000 of the $1,500,000 in total fines assessed on the two Sherman Act counts.

2. On February 22, 1983, more than a year after the entry of their guilty pleas, respondents filed a motion pursuant to Fed. R. Crim. P. 35(a) to vacate their sentences on the charges contained in the second indictment. Relying on the intervening decision in *United States* v. *Beachner Constr. Co.*, 555 F. Supp. 1273 (D. Kan. 1983), aff'd, 729 F.2d 1278 (10th Cir. 1984), respondents argued that there had been only a single conspiracy to rig bids in Kansas.[7] Respondents therefore contended that they were guilty of only one Sherman Act offense and that it violated the Double Jeopardy Clause to impose fines for both Sherman Act counts to which they had pleaded guilty.

The government argued that respondents' failure to raise their double jeopardy defense at any time before judgment and sentence precluded them from doing so on collateral attack. The government also contended that the two indictments on their faces charged separate conspiracies, and argued that respondents could not attack the factual foundations of the indictments to which they had pleaded guilty. The government stipulated, however, that if the court reached the merits of the one-conspiracy-or-two issue it could " 'consider the record made in the evidentiary

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[7] The defendants in *Beachner* alleged that the large conspiracy discussed in the Official Version of the Offense in the present case—*i.e.*, a large, continuing conspiracy to rig bids on any and all Kansas highway jobs—did not (as the government contended) end in 1973, when the major organizer of the conspiracy went out of business. The defendants there argued that the post-1973 bid-rigging agreements with which they were charged were merely part of the same large, continuing conspiracy. The district court agreed with the defendants and rejected the government's argument that, after 1973, each new bid-letting gave rise to an opportunity to form a new conspiratorial agreement. The government appealed, but the court of appeals held that the question was one of fact and that the district court's finding was not clearly erroneous.

hearing' " that was held in the *Beachner* case (Pet. App. 63a).[8]

Relying on *Kerrigan* v. *United States*, 644 F.2d 47 (1st Cir. 1981), the district court held that a defendant asserting a double jeopardy claim may not contest the factual foundations of the indictment to which he entered a guilty plea. The court concluded that respondents had no right to obtain a factual determination whether two conspiracies or only one existed. The court noted that each indictment, on its face, charged a separate conspiracy. The court held that respondents had admitted their participation in separate conspiracies and therefore could not raise a double jeopardy claim that depended on the existence of only a single conspiracy. Pet. App. 112a-123a.

3. A divided panel of the court of appeals reversed (Pet. App. 87a-111a). The court granted rehearing en banc, but the en banc court also reversed by a divided vote (Pet. App. 14a-86a). Relying on *Menna* v. *New York*, 433 U.S. 61 (1975), and *Blackledge* v. *Perry*, 417 U.S. 21 (1974), the

[8] The stipulation, which is quoted in full in Judge Barrett's dissent from the decision of the en banc court of appeals in this case (Pet. App. 63a), provides in its entirety:

> Come now the parties and stipulate that the Court may consider the record made in the evidentiary hearing on the Motion to Dismiss filed by Beachner Construction Co., Inc. in *United States v. Beachner Construction Co., Inc., et al.*, Case No. 82-20076-01 in the United States District Court for the District of Kansas in ruling on the merits of defendants' Motion to Vacate Sentence Pursuant to Rule 35(a) in the instant case.

Both before and after this stipulation was filed, the government consistently argued in the district court that respondents had forfeited any double jeopardy defense they could have asserted before their guilty pleas and that, in any event, respondents were bound by the facts they had admitted at the time the guilty pleas were taken and thus were not entitled to a new factual determination concerning the number of bid-rigging conspiracies in Kansas. See U.S. Reply Memo. 2-4.

majority held that the Double Jeopardy Clause "stands as an inhibition upon the government's right to institute charges" that is "absolute" and not "subject to waiver" (Pet. App. 18a). The majority added that "the defendants' plea bargain cannot work an estoppel of their right to assert the invalidity of the charge" (*id.* at 20a). The majority rejected the government's argument that "the defendants' pleas of guilty must be considered admissions of all the facts alleged in the indictments," asserting that the indictments "did not specifically allege separate conspiracies" and reasoning that "the admissions of factual guilt subsumed in the pleas of guilty go only to the acts constituting the conspiracy and not to whether one or more conspiracies existed" (*id.* at 21a).

Having decided that the district court erred by holding respondents to their admissions that two conspiracies existed, the court of appeals next addressed the issue whether two conspiracies did in fact exist. Although the majority suggested that on their face the indictments did not charge more than one conspiracy, it ultimately concluded that "the question of whether the indictments charged one or two conspiracies is, in the context of this case, wholly factual" (Pet. App. 23a). Because the district court had not addressed that factual issue in its opinion, the court remanded the case "for a factual determination" (*id.* at 24a).

Judge McKay joined the majority opinion, including the order remanding to the district court, but he expressed reluctance to concur in the remand because he believed that as a matter of law the second indictment charged the same conspiracy as the first indictment (Pet. App. 25a). Judge Seymour agreed with the majority's holding that respondents could raise their double jeopardy claim on collateral attack, but not with its underlying reasoning that the Double Jeopardy Clause is "an 'absolute inhibition' upon government" (*id.* at 28a). She also disagreed with the majority's decision to remand the case, arguing that "the *Beachner*

findings should * * * be accorded full preclusive effect in this proceeding" (*id.* at 39a).

Judges Barrett and Doyle filed separate dissenting opinions. Judge Barrett distinguished *Menna* and *Blackledge* on the ground that no factual hearing was required to resolve the double jeopardy and due process issues in those cases (Pet. App. 50a-51a). Judge Barrett argued "that an accused waives his claim of double jeopardy to a subsequent criminal charge if the crimes charged, on their faces, are separate and distinct and if the evidence necessary to establish guilt as to one charge differs from that necessary to establish guilt as to another" (*id.* at 51a (emphasis omitted)). Judge Barrett stated that each indictment, on its face, charged a separate conspiracy (*id.* at 56a, 64a). Similarly, Judge Doyle concluded that *Menna* and *Blackledge* are distinguishable and that the defendants have waived their double jeopardy argument in this case (Pet. App. 69a-86a).

4. On remand, the district court followed the approach taken in *Beachner* and found as a matter of fact that "the two indictments returned against these defendants charge simply different aspects of the same conspiracy to restrain competition" (Pet. App. 13a). The court therefore vacated the judgment and sentence entered on the second indictment (*ibid.*).

The government appealed, both renewing the argument that respondents were precluded from raising their double jeopardy claim in the circumstances of this case and arguing that the district court had committed reversible error in finding that there was only one conspiracy. While the appeal was pending, this Court decided *Ricketts* v. *Adamson*, No. 86-6 (June 22, 1987), holding that the defendant in that case had waived his double jeopardy rights through the terms of his plea agreement.

The court of appeals, once again divided, affirmed in a short opinion (Pet. App. 1a-4a). The court wrote (*id.* at 2a):

> Although *Ricketts* invalidates the broader rationale underlying the plurality [*sic*] opinion in *Broce*, that the double jeopardy prohibition "does not constitute an individual right which is subject to waiver," 781 F.2d 795, it does not affect its narrower holding, based on clear Supreme Court precedent, that a guilty plea does not itself constitute a waiver of double jeopardy protection. *Id.* at 796-97; *see also Menna v. New York*, 423 U.S. 61, 62-63 & n.2 (1975) (guilty plea is merely an admission of factual guilt, which does not bar a claim that the state may not constitutionally prosecute the defendant no matter how validly his factual guilt is established); *Blackledge v. Perry*, 417 U.S. 21, 29-31 (1974).

The court also rejected the government's argument that there were in fact two conspiracies (Pet. App. 2a-3a). Judge Barrett dissented (*id.* at 4a). Rehearing was denied, Judge Barrett again dissenting, and rehearing en banc was denied (*id.* at 124a-125a).

SUMMARY OF ARGUMENT

The general rule is that a defendant who is convicted after a voluntary and intelligent plea of guilty may not thereafter collaterally attack his conviction. In particular, it does not suffice to show that, in retrospect, the defendant misapprehended the government's case against him, or that he would not have pleaded guilty if he had known what later cases would hold. In two exceptional instances, this Court has held that a defendant was not bound by his plea of guilty to a facially invalid charge. *Blackledge* v. *Perry*, 417 U.S. 21 (1974); *Menna* v. *New York*, 423 U.S. 61 (1975). The court of appeals here relied on those two cases, but they have no bearing on this case, in which the convictions were facially valid and resulted from negotiated plea agreements.

A. Respondents' double jeopardy claim is based on their contention that there was, in fact, only a single conspiracy to rig bids in Kansas. Their pleas of guilty to the indictments in this case, however, established that there were two conspiracies, and the pleas therefore validly removed any issue of double jeopardy from this case. The court of appeals erred in permitting respondents to litigate a factual issue that had been resolved by their pleas.

Each indictment on its face charged a separate conspiracy to rig bids. Respondents, advised by counsel, entered voluntary and intelligent pleas of guilty, whose legal effect was to admit all of the material facts of the formal criminal charges contained in the indictments. Moreover, at the time respondents entered their guilty pleas and were sentenced, they were given a specific opportunity to challenge the government's contention that there were separate conspiracies, and they affirmatively declined to do so.

Having pleaded guilty in 1982 to two separate conspiracies, respondents were not entitled to reopen the issue in subsequent collateral proceedings. Nothing in *Blackledge* or *Menna* allows a defendant to repudiate factual admissions implicit in an otherwise valid guilty plea so that he can assert a new defense. In neither case did the Court rely on facts contrary to those that the defendant had admitted in pleading guilty. Indeed, each case rested on the facial invalidity of the charge to which the defendant pleaded guilty, and neither case required any further factfinding whatever.

B. Unlike the defendants in *Blackledge* and *Menna,* respondents pleaded guilty pursuant to plea agreements. Those agreements gave respondents substantial benefits, including the government's promise not to prosecute them for other bid-rigging activity in either Kansas or Oklahoma. To secure that promise from the government, respondents agreed to plead guilty to two indictments charging separate

bid-rigging conspiracies. These agreements constitute valid and enforceable contracts that respondents—having permanently obtained the benefits of the government's promises—should not have been allowed to repudiate. A defendant's plea agreement that subjects him to what he only later claims is a second prosecution for the same offense is binding and enforceable, and the Double Jeopardy Clause does not of its own force relieve the defendant from his voluntary choice to enter into that agreement. *Ricketts* v. *Adamson, supra.*

Here respondents made a deliberate and counseled decision to subject themselves to the maximum penalty on two conspiracy charges rather than risk the possibility of much greater liability for all of their bid-rigging activities in both Kansas and Oklahoma. Respondents had the opportunity to challenge the government's theory that each Kansas bid-letting gave rise to a separate conspiracy, but they elected not to do so. The government, by not pursuing other charges, detrimentally relied on respondents' choice not to raise the double jeopardy issue before pleading guilty, and that detrimental reliance is a sufficient basis to hold respondents to their pleas.

ARGUMENT

RESPONDENTS ARE NOT ENTITLED TO INVALIDATE CONVICTIONS, FOLLOWING GUILTY PLEAS PURSUANT TO PLEA AGREEMENTS, ON DOUBLE JEOPARDY GROUNDS

The basic rules governing attempts by defendants to overturn their own prior guilty pleas were established by this Court in a trilogy of cases decided in 1970 and a fourth case decided in 1973. *Brady* v. *United States,* 397 U.S. 742 (1970); *McMann* v. *Richardson,* 397 U.S. 759 (1970); *Parker* v. *North Carolina,* 397 U.S. 790 (1970); *Tollett* v. *Henderson,* 411 U.S. 258 (1973). In each case, the defendant had a

defense that might have been successful if he had litigated it rather than pleading guilty, but the Court refused to allow the guilty plea to be set aside on the basis of later factual or legal developments indicating that the defense might have succeeded.[9] The Court wrote (*Brady*, 397 U.S. at 755 (citations and quotation marks omitted)):

> [A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation * * *, or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e. g., bribes).[10]

Elaborating on this stringent standard, the Court added in *Brady* that "[a] defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative

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[9] *Brady* involved a plea of guilty allegedly induced by the defendant's fear that he would receive the death penalty—under a statute whose death penalty provision was later held unconstitutional in *United States* v. *Jackson*, 390 U.S. 570 (1968)—if he went to trial. *McMann* involved pleas of guilty allegedy induced by the defendants' expectation that coerced confessions would—under a procedure later held unconstitutional in *Jackson* v. *Denno*, 378 U.S. 368 (1964)—be made known to the same jury that would decide the defendants' guilt or innocence. *Parker* involved a plea of guilty allegedly induced both by fear of the death penalty (under a statute alleged to be unconstitutional) and by fear of the use of an allegedly coerced confession. *Tollett* involved a claim, well grounded in fact but unknown to the defendant and his counsel at the time of the guilty plea in 1948, that black persons were systematically excluded from grand juries in Davidson County, Tennessee.

[10] The Court recently repeated this statement in *Mabry* v. *Johnson*, 467 U.S. 504, 509 (1984).

courses of action" (397 U.S. at 757). "[T]he decision to plead guilty before the evidence is in frequently involves the making of difficult judgments" (*McMann*, 397 U.S. at 769), in part because "uncertainty is inherent in predicting court decisions" (*id.* at 771). Thus, "[w]aiving trial entails the inherent risk that the good-faith evaluations of a reasonably competent attorney will turn out to be mistaken either as to the facts or as to what a court's judgment might be on given facts" (*id.* at 770). "Although [the defendant] might have pleaded differently had later decided cases then been the law, he is bound by his plea and his conviction unless he can allege and prove serious derelictions on the part of counsel sufficient to show that his plea was not, after all, a knowing and intelligent act" (*id.* at 774). Refusing (in light of the defendant's guilty plea) to entertain an apparently meritorious challenge to the composition of the grand jury, the Court added in *Tollett*, 411 U.S. at 267:

> A guilty plea, voluntarily and intelligently entered, may not be vacated because the defendant was not advised of every conceivable constitutional plea in abatement he might have to the charge, no matter how peripheral such a plea might be to the normal focus of counsel's inquiry. And just as it is not sufficient for the criminal defendant seeking to set aside a plea to show that his counsel in retrospect may not have correctly appraised the constitutional significance of certain historical facts, * * * it is likewise not sufficient to show that if counsel had pursued a certain factual inquiry such a pursuit would have uncovered a possible constitutional infirmity in the proceedings.

In *Blackledge* v. *Perry*, 417 U.S. 21 (1974), and *Menna* v. *New York*, 423 U.S. 61 (1975), the Court made clear that the *Brady/Tollett* rule does not mean that a guilty plea waives the right to assert the facial invalidity of the very

charge to which the defendant pleads. In *Blackledge*, the defendant was convicted of a misdemeanor but then invoked his state-law right to a trial de novo in a higher court. The prosecutor then secured a felony indictment covering the same conduct as the earlier trial and conviction. The defendant pleaded guilty to the felony charge, but this Court overturned the conviction, holding that the Due Process Clause forbade the prosecutor from obtaining a felony indictment in these circumstances. The Court rejected the State's "understandable" (*id.* at 30) argument that the defendant's guilty plea precluded his constitutional challenge to the bringing of the felony charge, stating that it was dealing with "the very power of the State to bring the defendant into court to answer the charge brought against him" (*ibid.*). The Court distinguished *Tollett* on the ground that "even a tainted indictment of the sort alleged in *Tollett* [*i.e.*, one returned by an unconstitutionally composed grand jury] could have been 'cured' through a new indictment by a properly selected grand jury" (417 U.S. at 30).

The next year, the Court summarily reversed a lower court decision finding a "waiver" of a double jeopardy claim by a guilty plea to a second charge based on conduct for which the defendant had previously been convicted and punished. *Menna* v. *New York*, *supra*. The defendant had been convicted of criminal contempt for failure to testify before a grand jury; after serving his contempt sentence, he was indicted for refusal to answer questions before the grand jury. A double jeopardy claim, later conceded to be "a strong one on the merits" (*id.* at 62 n.1), was rejected by the trial court, and the defendant then pleaded guilty. The conviction was affirmed on the basis of *Tollett*, but this Court reversed on the authority of *Blackledge* and remanded for a determination of the merits of the double jeopardy claim (423 U.S. at 62). In a footnote, the Court explained why it was *Blackledge* rather than *Tollett* that controlled the outcome: "The point of [the *Tollett* and *Brady* line of cases] is that a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it *quite validly* removes the issue of factual guilt from the case" (423 U.S. at 62 n.2). In the same footnote, the Court added, "We do not hold that a double jeopardy claim may never be waived. We simply hold that a plea of guilty to a charge does not waive a claim that – judged on its face – the charge is one which the State may not constitutionally prosecute" (*id.* at 63 n.2).

It is the rule of *Tollett* and the *Brady* trilogy, not the exception recognized in *Blackledge* and *Menna*, that governs this case. First, the effect of the guilty pleas in this case was not any sort of "waiver" but the valid elimination of any double jeopardy issue from the case. Judged on their face, the indictments in this case presented charges that the government had the power to prosecute separately. Respondents' counseled pleas of guilty admitted the material facts set forth in the indictments. Respondents' double jeopardy claim is wholly dependent on factual assertions inconsistent with the facts set forth in the indictments, and the guilty pleas therefore "*quite validly* remove[d] the issue of [double jeopardy] from the case" (paraphrasing *Menna*, 423 U.S. at 62 n.2). A second and independent reason why this case is unlike *Blackledge* and *Menna* is that it involves more than mere guilty pleas: it involves a plea agreement supported by valid consideration. Respondents' agreement to plead guilty to two counts, in exchange for the government's promise not to bring other charges, was a valid and binding agreement that "removed the double jeopardy bar" (*Adamson*, slip op. 6). The government has detrimentally relied on respondents' promises, and allowing respondents now to repudiate those promises would prejudice the government in a way that the decisions in *Blackledge* and *Menna* did not.

A. Respondents Were Not Entitled To Litigate Factual Questions After Pleading Guilty

The indictments in this case charged two different agreements (and therefore two different conspiracies), beginning on different dates, to rig bids on two different projects. There is no question of double jeopardy in this case unless those allegations were factually wrong. But respondents admitted the allegations by pleading guilty, and they had no right – constitutional or otherwise – later to litigate factual questions that were resolved by their pleas.

It is well established that an unconditional plea of guilty is an admission of all the elements and material facts of the criminal charge contained in the indictment. *McCarthy* v. *United States*, 394 U.S. 459, 466 (1969); see also *Menna*, 423 U.S. at 62-63 n.2 (guilty plea admits "factual guilt"). As such, the guilty plea "is itself a conviction. Like a verdict of a jury it is conclusive." *Kercheval* v. *United States*, 274 U.S. 220, 223 (1927); *Machibroda* v. *United States*, 368 U.S. 487, 493 (1962); see also *Boykin* v. *Alabama*, 395 U.S. 238, 242 (1969); *Mabry* v. *Johnson*, 467 U.S. 504, 508 (1984). The plea substitutes a binding confession of the facts alleged in the indictment, and explained to the defendant, for a jury verdict finding that the same facts have been proved beyond a reasonable doubt. See *Henderson* v. *Morgan*, 426 U.S. 637, 647-648 (1976) (White, J., concurring). " 'A plea of guilty is more than a voluntary confession made in open court. *It also serves as a stipulation that no proof by the prosecution need be advanced.* . . . It supplies both evidence and verdict, ending controversy.' " *Boykin*, 395 U.S. at 242-243 n.4 (quoting *Woodard* v. *State*, 42 Ala. App. 552, 558, 171 So. 2d 462, 469 (1965)) (emphasis added). By entering pleas of guilty to both conspiracy charges in this case, respondents admitted the facts alleged in the indictments and stipulated that the government need not put on evidence to prove the factual proposition that there were two separate conspiracies.

Respondents knew that they were making factual admissions: the district court admonished them at the plea-taking hearing that by pleading guilty they would be admitting all of the facts alleged in the indictments. And, as we have already noted, respondents were given further opportunities to dispute the government's version of their offenses, including its explicit statement that there were two separate conspiracies, yet they did not take those opportunities. Indeed, Mr. Broce even volunteered under oath – in direct contradiction to the theory later adopted in *Beachner* – that he intended each bid-rigging agreement to "stand on its own" (J.A. 41).

The Double Jeopardy Clause does not entitle a defendant to mount a collateral attack on the factual determination, made by his own admission via a guilty plea, that he entered into two conspiratorial agreements rather than one. The double jeopardy issue is in this respect like the issue of factual guilt: a defendant has a constitutional right – a right of the very highest order – not to be punished unless he is guilty of crime, but his counseled plea of guilty "*quite validly* removes the issue of factual guilt from the case" (*Menna*, 423 U.S. at 62 n.2). For example, a defendant who pleads guilty to conspiracy, only to learn later that the government's case was so weak that his co-conspirator who went to trial was acquitted, is not entitled to have his conviction set aside: *his* factual guilt was determined with finality by the process he chose. So here, respondents now regret pleading guilty to the two conspiracies in light of the defendants' success in the *Beachner* case, but they "solemnly admitted" the relevant facts (*Tollett*, 411 U.S. at 267), and as to them any question of whether there was one conspiracy or two was resolved with finality by their pleas.

It is no objection that respondents' counsel could not foresee the outcome in *Beachner*. By choosing to plead guilty, respondents ran "the inherent risk that the good-faith evaluations of a reasonably competent attorney will turn out to be mistaken either as to the facts or as to what a court's judgment might be on given facts" (*McMann*, 397 U.S. at 770). "[J]ust as it is not sufficient for the criminal defendant seeking to set aside a plea to show that his counsel in retrospect may not have correctly appraised the constitutional significance of certain historical facts, * * * it is likewise not sufficient that he show that if counsel had pursued a certain factual inquiry such a pursuit would have uncovered a possible constitutional infirmity in the proceedings" (*Tollett*, 411 U.S. at 267). Like the defendant who pleads guilty but later insists that he is "really" innocent, respondents have come to court too late to insist on the right to a trial of the question whether there was one conspiracy or two. That factual determination was made as to them when they pleaded guilty. *Boykin*, 395 U.S. at 242-243 n.4.

Neither *Blackledge* nor *Menna* involved reopening any factual issue resolved by the guilty plea. In *Blackledge*, the Court ruled, without any inquiry into the prosecutor's actual motivation (see 417 U.S. at 28) or any other disputed issue of fact, that due process did not permit the felony charge to be brought at all. The double jeopardy issue in *Menna* involved a question of state law that was left to the state courts to resolve on remand: whether, as a matter of New York law, the contempt conviction and the later refusal-to-answer conviction were "for the same crime" (423 U.S. at 62 n.1). Indeed, the Court carefully limited its holding to the situation in which "judged on its face * * * the charge is one which the State may not constitutionally prosecute" (*id.* at 63 n.2)—just the opposite of the situation in this case, in which the claimed constitutional

infirmity rests on factual allegations that contradict the indictments.

We submit that the First Circuit's opinion in *Kerrigan* v. *United States*, *supra*, on which the district court relied when it initially denied relief (Pet. App. 119a-122a), correctly stated the controlling principles to be derived from this Court's decisions. In *Kerrigan*, the defendant "was sentenced on the basis of guilty pleas to two indictments, both charging conspiracy to transport stolen goods in interstate commerce" (644 F.2d at 47). The guilty pleas were entered pursuant to a plea bargain in which the defendant agreed to plead guilty to both conspiracy charges and the government agreed to dismiss one other count and to make certain recommendations concerning sentence. His pleas were accepted, and he was sentenced to three years' imprisonment for one conspiracy and a consecutive two-year term for the other. *Id.* at 48. On collateral attack (see *id.* at 47), Kerrigan argued "that there was in fact only one conspiracy" (*id.* at 48). The First Circuit rejected Kerrigan's argument that *Menna* required an evaluation of his double jeopardy claim on its merits, observing that *Menna* does not hold "that a defendant who pleaded guilty may later contest the factual and theoretical foundations of the indictment to which he pleaded, so as to show that, in fact, he committed only a single offense" (*id.* at 49). And the court refused to consider Kerrigan's argument that there was in fact only one conspiracy, holding that "Kerrigan's claim of double jeopardy must be evaluated under the version of facts stated in the indictment, not against an alternative version of events which Kerrigan now claims is more accurate" (*ibid.*).

Like the indictments in *Kerrigan*, the indictments in this case plainly allege separate conspiracies. One indictment charges a conspiracy starting in April 1978 to rig bids on the Meade County project; the other charges a conspiracy starting in July 1979 to rig bids on the Barton County proj-

ect. If those allegations were true, there were two conspiracies: "[I]ndictments charging two or more agreements, even agreements to commit similar or related crimes, charge more than one conspiracy" (*Kerrigan*, 644 F.2d at 49). See *Kotteakos* v. *United States*, 328 U.S. 750, 769 (1946) (distinguishing "the common purpose of a single enterprise" from "the several, though similar, purposes of numerous separate adventures of like character").

The en banc court of appeals' statement that the second indictment "contained no specific charge that the conspiracy itself was separate from the conspiracy alleged in the first indictment" (Pet. App. 21a) is irrelevant. The scope of any conspiracy is the scope of the unlawful agreement. See *Iannelli* v. *United States*, 420 U.S. 770, 777 (1975); *Braverman* v. *United States*, 317 U.S. 49, 52-53 (1942). To charge that there were two different agreements, therefore, is to charge that there were two separate conspiracies. There is no need for a distinct statement that an agreement beginning in July 1979 was a different agreement from one beginning in April 1978. Because each indictment in this case charged an agreement to rig bids on a particular project, respondents' guilty pleas admitted participation in separate conspiracies and precluded a later evidentiary hearing to determine whether there was in fact only one conspiracy. See *United States* v. *Allen*, 724 F.2d 1556, 1557-1558 (11th Cir. 1984) (refusing to consider claim that two counts in the indictment "constituted a single offense for which [defendant] could receive only a single sentence"); *United States* v. *Pratt*, 657 F.2d 218, 220-221 (8th Cir. 1981) (rejecting argument "that *Menna* * * * requires us to reach the merits of Pratt's double-jeopardy argument"); *Kerrigan*, 644 F.2d at 49 (observing that *Menna* does not hold "that a defendant who pleaded guilty may later contest the factual and theoretical foundations of the indictment to which he pleaded [guilty],

so as to show that, in fact, he committed only a single offense").[11]

In this case no showing sufficient to support a double jeopardy defense could have been made without *contradicting* the factual allegations of the indictments. We think it equally clear, however, that a defendant should not be allowed to attack a conviction based on a guilty plea when the attack depends on *supplementing* the record with factual findings. It is not the role of an indictment to negate all possible defenses (*United States* v. *Sisson*, 399 U.S. 267, 288 (1970)), and it will often be the case that the factual allegations in an indictment, although they do not show a violation of the Double Jeopardy Clause, are not sufficient to disprove the double jeopardy defense either. A defendant who does not plead guilty may then attempt to establish a valid double jeopardy defense, in pretrial proceedings or at trial, either by proving that the allegations of the indictment are untrue or by proving other facts that are neither alleged in nor contradicted by the indictment. But a defendant who chooses to plead guilty rather than make such a factual showing forgoes the procedure that the law provides and thus forfeits his right to make that showing.

The court of appeals' holding that respondents were entitled to an evidentiary hearing on factual issues resolved by their guilty pleas is unprecedented. Although some other

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[11] See also *United States* v. *Griffin*, 765 F.2d 677, 680-682 (7th Cir. 1985); *United States* v. *Solomon*, 726 F.2d 677, 678 n.2 (11th Cir. 1984); *United States* v. *Herzog*, 644 F.2d 713, 716 (8th Cir.), cert. denied, 451 U.S. 1018 (1981); *Brown* v. *Maryland*, 618 F.2d 1057, 1058-1059 (4th Cir.), cert. denied, 449 U.S. 878 (1980); cf. *United States* v. *Sheehy*, 541 F.2d 123, 130 & n.20 (1st Cir. 1976) (defendant may not raise multiplicity argument for the first time on appeal); *United States* v. *Perez*, 565 F.2d 127, 1232 (2d Cir. 1977) (double jeopardy argument waived if not asserted before trial); *United States* v. *Bascaro*, 742 F.2d 1335, 1365 (11th Cir. 1984) (same), cert. denied, 472 U.S. 1017 (1985).

courts of appeals have allowed double jeopardy attacks on prior guilty pleas, no court of appeals has allowed the defendant to impeach factual determinations inherent in the making and acceptance of an otherwise valid guilty plea. In most cases in which a double jeopardy claim has been allowed, the courts have stressed that no factual issue was presented. See *Launius* v. *United States,* 575 F.2d 770, 771 (9th Cir. 1978) ("[i]t appeared on the face of the indictment that but one agreement was involved and hence but one conspiracy"); *United States* v. *Baugh,* 787 F.2d 1131, 1132 (7th Cir. 1986) ("This court need not transcend the four corners of the information in this case in order to assess the validity of Baugh's claim."); *United States* v. *Broussard,* 645 F.2d 504, 505 (5th Cir. 1981) (rejecting double jeopardy claim without requiring fact finding); see also *United States* v. *Blocker,* 802 F.2d 1102, 1104-1105 (9th Cir. 1986) (same). In only one case other than this one has a court allowed a double jeopardy defense based on fact finding, but even in that case the court was careful to note that it would not (as the court below did) allow a defendant to impeach the factual determinations made by the plea: "A petitioner who later contests his sentence on double jeopardy grounds after entering a guilty plea * * * has lost his right to challenge or dispute either the information in the indictment or any other facts he admitted when his guilty plea was taken." *United States* v. *Atkins,* 834 F.2d 426, 439 (5th Cir. 1987).[12]

[12] For the reasons stated at p. 23, *supra,* we believe that *Atkins* was wrongly decided. In *Atkins,* the allegations in the indictment did not establish a double jeopardy claim but neither did they demonstrate that no such claim could be valid. In those circumstances, the court found further factfinding appropriate. There is, however, no support in this Court's cases for such a procedure. To the contrary, a defendant who elects not to put the government to its proof at the time of his plea in effect stipulates that he will not call on the government to prove its case (see *Boykin,* 395 U.S. at 242-243 n.4). The guilty plea should foreclose later factual proceedings designed to supplement the allegations of the indictment as well as later factual proceedings designed to contradict the allegations of the indictment.

There is no justification for allowing a factual inquiry into whether two facially distinct crimes to which a defendant has pleaded guilty were in fact the same offense, and the court of appeals provided none except its erroneous reading of *Blackledge* and *Menna* as cases attaching talismanic significance to any and all invocations of the Double Jeopardy Clause. Indeed, the decision of the court of appeals, if affirmed, would simply encourage defendants to challenge their sentences long after their guilty pleas are entered. Any incarcerated defendant who as a result of a guilty plea has received consecutive sentences for two similar crimes, and any defendant who as a result of a guilty plea has been assessed cumulative fines for two similar crimes, would have the right to a factual determination whether those crimes are actually distinct. That would be true notwithstanding the defendant's failure to raise this factual issue at any time before pleading guilty, and it would be true no matter how much time has passed since conviction.[13] The double jeopardy claim would seldom prove meritorious, but it would rarely be possible to dispose of the claim without a hearing. As the requirement of a factual hearing is asserted to be of federal constitutional origin, this claim would be cognizable in habeas corpus actions brought by state prisoners as well as on collateral attack by convicted federal defendants. And, according to the court below, the defendant's right to obtain a factual determination of his double

[13] Cf. *United States* v. *Griffin,* 765 F.2d 677, 681-682 (7th Cir. 1985) (because "it would be to the defendant's tactical advantage to delay bringing * * * multiplicity claim until after trial" since government's evidence may be lost or become stale, defendant is required to assert multiplicity defense based on indictment before trial).

jeopardy claim includes the right to contradict facts he admitted in his plea-taking or sentencing hearing.

Nothing in *Blackledge* or *Menna* suggests any such result. Indeed, such a result is inconsistent with this Court's prior decisions concerning the effect of guilty pleas and the finality of convictions. See, *e.g.*, *Kercheval* v. *United States, supra*; *McCarthy* v. *United States, supra*; *Santobello* v. *New York*, 404 U.S. 257, 261 (1971) (plea bargaining "leads to prompt and largely final disposition of most criminal cases"); *Blackledge* v. *Allison*, 431 U.S. 63, 71 (1977) ("dispositions by guilty plea are accorded a great measure of finality"); *Mabry* v. *Johnson*, 467 U.S. at 508 (footnote omitted) ("It is well settled that a voluntary and intelligent plea of guilty made by an accused person, who has been advised by competent counsel, may not be collaterally attacked."). Respondents' claim of double jeopardy – unlike the constitutional claims presented in *Blackledge* and *Menna* – depends on factual assertions that are inconsistent with, or go beyond, the facts set forth in the indictments and admitted by their guilty pleas. The court of appeals erred in allowing respondents to repudiate those admissions, and its decision, therefore, should be reversed.

B. Respondents Were Not Entitled To Repudiate Their Guilty Pleas After Inducing the Government To Rely on Those Pleas

There is a second and independent reason why respondents should not be permitted to make a collateral attack on their convictions here. Respondents entered into a plea agreement under which the United States agreed not to prosecute them on other charges in return for their pleas of guilty to two conspiracy charges. The plea agreement was a valid contract. Having entered into it and received its benefits, respondents should not have been allowed to repudiate their half of the bargain.

"[T]he Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice." *United States* v. *Scott*, 437 U.S. 82, 99 (1978).[14] Just last Term, this Court applied that principle to the case of a defendant who – like respondents – sought to invoke the Clause as a means to escape from the terms of his plea agreement. In *Ricketts* v. *Adamson, supra*, the Court held that the defendant could be convicted of first-degree murder even after his prior guilty plea to a lesser included offense, because he had agreed that if he failed to give certain promised testimony the original first-degree murder charge would be automatically reinstated (slip op. 7). *Adamson* thus holds that a defendant may validly agree to a bargain that includes the possibility of a sec-

[14] This statement from *Scott* encapsulates the underlying principle of numerous cases in which this Court has held that, when it is the defendant's own actions that lead to more than one prosecution for a single charge, the Double Jeopardy Clause does not forbid that result. See, *e.g.*, *United States* v. *Ball*, 163 U.S. 662, 671-672 (1896); *United States* v. *Tateo*, 377 U.S. 463, 465 (1964); *United States* v. *Jorn*, 400 U.S. 470, 485 (1971) (plurality opinion); *United States* v. *Dinitz*, 424 U.S. 600, 608 (1976); *Lee* v. *United States*, 432 U.S. 23, 33 (1977); *Scott*, 437 U.S. at 93; *Sanabria* v. *United States*, 437 U.S. 54, 63 n.15 (1978). For example, multiple prosecutions growing out of the same offense are permissible when the second proceeding was prompted or made necessary by the defendant's voluntary actions. Thus, "although a defendant is normally entitled to have charges on a greater and a lesser offense resolved in one proceeding, there is no violation of the Double Jeopardy Clause when he elects to have the two offenses tried separately and persuades the trial court to honor his election." *Jeffers* v. *United States*, 432 U.S. 137, 152 (1977) (plurality opinion) (footnote omitted). And the Court has held that a defendant's guilty plea to a lesser included offense does not bar trial on the greater offense charged along with it, if it was the defendant's effort that led to "separate disposition of counts in the same indictment." *Ohio* v. *Johnson*, 467 U.S. 493, 502 (1984). See also *Garrett* v. *United States*, 471 U.S. 773, 798 (1985) (O'Connor, J., concurring).

ond prosecution for the same offense. If he chooses to take actions that subject him to a second prosecution, the "Double Jeopardy Clause does not relieve him from the consequences of that choice" (slip op. 9).

This case is very similar in that respect to *Adamson*. In each case a defendant made an agreement that did not mention the Double Jeopardy Clause[15] but in which he obtained substantial benefits for his guilty plea. In *Adamson,* the defendant entered a plea of guilty and promised to testify on behalf of the State, in exchange for which he gained a substantial benefit – the substitution of the charge of second-degree murder in place of the first-degree murder charge and the prospect of the death penalty. Here, in exchange for their agreements to plead guilty to the Meade County bid-rigging indictment and the Barton County bid-rigging allegations, respondents got the benefits of no further prosecution for bid rigging in either Kansas or Oklahoma, a dismissal of the mail fraud count, and a recommendation (which the trial court accepted) of less than the maximum fine. Both in *Adamson* and in this case, the defendants were thoroughly counseled by an attorney in the plea-bargaining process. In both cases, the defendants knew very well the meaning of their pleas. Finally, in both cases the defendants breached their plea agreements. The cases differ in the relief sought by the prosecution. On the defendant's breach in *Adamson*, the prosecution relied on the terms of the agreement, which entitled the State, on the defendant's breach, to return to the status quo ante and prosecute the defendant for first-degree murder. In this case the prosecution seeks specific performance of the plea agreement to the extent of holding respondents to their pleas

[15] In *Adamson* this Court concluded that the fact "that 'double jeopardy' was not specifically waived by name in the plea agreement" was irrelevant (slip op. 7).

Like the defendant in *Adamson*, respondents in this case made a voluntary choice. Rather than risk prosecution on all of their bid-rigging activities in Kansas and Oklahoma, they agreed to plead guilty to specific charges in exchange for the government's agreement not to prosecute them further (and other government concessions). Now that respondents have received those benefits, they would like to "use the Double Jeopardy Clause as a sword" (*Ohio* v. *Johnson*, 467 U.S. at 502) and avoid their obligations under the plea agreement. But if the government may, as in *Adamson,* prosecute a defendant on the original charges following the defendant's breach of a plea agreement, then the government should also be permitted to hold the defendant to the plea agreement in the first place without regard to obstacles the Double Jeopardy Clause might impose in the absence of the plea agreement.

As in *Adamson,* the agreements into which respondents entered in this case were valid and enforceable bargains. The only basis on which respondents seek to escape from those bargains is the one the Court rejected in *Adamson*: that the multiple prosecutions (and, in this case, sentences) to which they have been subjected, although expressly contemplated in the agreements, are nevertheless barred by the policy of the Double Jeopardy Clause itself. That policy, however, is no reason why a counseled defendant who agrees to plead to a facially valid indictment should not be held to his bargain, particularly one from which he has received substantial benefits.[16] "The parties could have struck a

[16] Respondents have permanently obtained the benefit of their bargain here. The events of the last six years effectively preclude the United States from prosecuting respondents in response to their refusal to pay the full fines imposed pursuant to the plea agreement. Mr. Broce testified under a grant of immunity at several Oklahoma trials. Moreover, the passage of time, even if the statute of limitations has not yet expired, makes an Oklahoma prosecution a most unattractive

different bargain, but permitting the [United States] to enforce the agreement the parties actually made does not violate the Double Jeopardy Clause" (*Adamson*, slip op. 10).[17]

This Court has long recognized that plea agreements "are consistent with the requirements of voluntariness and intelligence—because each side may obtain advantages when a guilty plea is exchanged for sentencing concessions, the agreement is no less voluntary than any other bargained-for exchange." *Mabry* v. *Johnson*, 467 U.S. at 508 (footnote omitted). When both the prosecution and the defense make concessions to secure a plea bargain that provides

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and perhaps impossible alternative. As is often the case when a constitutional claim is raised for the first time on collateral attack after an earlier guilty plea, the government is no longer in a position to go forward with a full prosecution of the charges dismissed in reliance on the plea agreement. See, *e.g.*, *United States* v. *Griffin*, 765 F.2d at 681-682; Westen, *Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 Mich. L. Rev. 1214, 1235-1236, 1248, 1257 (1977); see also *Kuhlmann* v. *Wilson*, 477 U.S. 436, 453 (1986) (opinion of Powell, J.); *Davis* v. *United States*, 411 U.S. 233, 241 (1973).

[17] *Adamson* did not, of course, involve the prohibition embodied in the Double Jeopardy Clause against multiple punishments for the same offense. But the acceptance of the possibility that the sentencing court would impose multiple punishments for the two conspiracy charges in this case was part of the bargain that respondents struck with the government, in return for the nonprosecution of charges that carried with them the potential for substantial additional punishment. Respondents acknowledged as much (see p. 4, *supra*). There is no logical reason why a defendant who strikes such a bargain should be able to escape from his bargain any more readily than the defendant who agrees, in return for the dropping of other charges, to plead guilty to a crime he later claims he did not "really" commit. "Respondent[s] [were] fully aware of the likely consequences when [they] pleaded guilty; it is not unfair to expect [them] to live with those consequences now." *Mabry* v. *Johnson*, 467 U.S. at 511.

benefits to each, a court should respect the bargain. The question whether the government could otherwise have prosecuted the defendants on each of two counts is properly treated as foreclosed by the parties' agreement. See *United States* v. *Pratt*, *supra*; *United States* v. *Allen*, *supra*.

Nothing in *Blackledge* or *Menna* affects this analysis, for neither case involved an agreement not to bring other charges in exchange for the defendant's guilty plea. In a different context, this Court has distinguished *Blackledge* on just that ground, holding that its analysis does not apply to "the give-and-take negotiation common in plea bargaining between the prosecution and defense." *Bordenkircher* v. *Hayes*, 434 U.S. 357, 362 (1978); *United States* v. *Goodwin*, 457 U.S. 368, 375-380 (1982); see also *Blackledge*, 417 U.S. at 36-37 (Rehnquist, J., dissenting).

The government's reliance interest is one that Members of this Court have recognized as an important consideration in determining whether a guilty plea should be set aside. See *Dukes* v. *Warden*, 406 U.S. 250, 258 (1972) (Stewart, J., concurring); *id.* at 266 (Marshall, J., dissenting) ("Where the government *can* show specific and substantial harm, the defendant may be held to his plea."); *id.* at 271 n.9 ("Ours is not a case in which, prior to the defendant's motion to vacate his plea, the government had performed its part of a plea bargain and could not be restored to the *status quo ante*.") It was respondents' conduct on which the government relied in failing to prosecute any Oklahoma charges against respondents, and respondents should not be permitted first to induce that reliance by the government and then to take advantage of the government's consequent actions. See Westen, *supra*, 75 Mich. L. Rev. at 1259 (footnote omitted) (a defendant "can * * * forfeit complete defenses to a charge if, by his conduct, he leads the state to believe that it will not have to take him to trial on other outstanding charges"); Westen, *Forfeiture by Guilty Plea—A Reply*,

76 Mich. L. Rev. 1308, 1322 & n.49 (1978); 2 W. LaFave & J. Israel, *Criminal Procedure* § 20.6, at 680-681 (1984); *United States* v. *Pratt*, 657 F.2d at 220 (Pratt "pleaded guilty, presumably, because he preferred the certainty of a maximum of ten years to the risk of conviction and punishment on each of six counts. * * * [W]e think it would be unfair to the United States * * * to consider now the double-jeopardy claim urged by defendant."); see also Saltzburg, *Pleas of Guilty and the Loss of Constitutional Rights: The Current Price of Pleading Guilty*, 76 Mich. L. Rev. 1265, 1293 (1978) ("[i]f the defendant prefers the existing charges to the prospective charges and agrees to forego the double jeopardy defense in exchange for the benefit of not facing the new charges, a court could reasonably respect the bargain, since the government gave up a legitimate opportunity to prosecute in order to please the defendant"); Brilmayer, *State Forfeiture Rules and Federal Review of State Criminal Convictions*, 49 U. Chi. L. Rev. 741, 760-761 n.91 (1982).

The government agreed not to pursue other charges against respondents in reliance on their promise to plead guilty to two Sherman Act conspiracies, not one. The result of the decision below is that respondents will have secured the full benefit of the government's promise while paying only the fines assessed on one count. Had respondents raised their double jeopardy argument at the time of plea negotiations, the government might have elected to pursue other charges (in particular, Oklahoma conspiracy charges) and either to litigate those charges or to agree that respondents could plead guilty to one Kansas conspiracy and one Oklahoma conspiracy in exchange for the benefits that respondents actually received. But respondents chose a different course, withholding their double jeopardy argument until later, and the court of appeals has now rewarded that delay. We know of no double jeopardy principle—and

Menna and *Blackledge* certainly stand for none—that requires that result.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General
CHARLES F. RULE
Assistant Attorney General
LOUIS R. COHEN
Deputy Solicitor General
KENNETH G. STARLING
Deputy Assistant Attorney General
ROY T. ENGLERT, JR.
Assistant to the Solicitor General
JOHN J. POWERS, III
JOHN P. FONTE
Attorneys

MAY 1988

U.S. GOVERNMENT PRINTING OFFICE 1988—202 037/60582